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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-27

ABRAHAM GRUNIN,

Petitioner,

vs.

INTERNATIONAL HOUSE OF PANCAKES, a division of INTERNATIONAL INDUSTRIES, INC.,

Respondent.

Brief of Respondent International Industries, Inc. in Opposition to Petition for Certiorari.

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Brief of Respondent International Industries, Inc. in Opposition to Petition for Certiorari.

Preliminary Statement.

The simple question sought to be brought before this Court by the subject Petition is merely whether the District Court abused its discretion in approving the settlement of a class action pursuant to Rule 23(e), F.R.C.P.; and whether the Court of Appeals erred in affirming the Judgment of approval. The action so settled was one that had been brought and maintained under Section 1 of the Sherman Act on behalf of a class and subclass of three hundred ten current and former franchisees of International House of Pancakes restaurants franchised by defendant. Petitioner was the single dissenting member of either class or subclass to oppose the settlement before the District Court, and was the

sole appellant challenging the Judgment of approval before the Court of Appeals.[1] He now seeks to continue his lonely crusade before this Court.

The pretentious tone of the Petition belies the routine nature of the issue tendered for review and the undeniably correct manner in which the Court of Appeals resolved that issue. [*Grunin v. International House of Pancakes,* 8 Cir., 513 F.2d 114.] Petitioner does no more here than to repeat the same arguments raised by him before the Court of Appeals and thoroughly considered by that Court. As ground for invoking the jurisdiction of this Court, he argues only that the Court of Appeals was erroneously unpersuaded by his arguments. He points to no conflict between the decision of that Court and that of any other Court of Appeals, does not claim the decision to have decided an important or any question of federal law in a manner in conflict with the applicable decisions of this Court or upon any issue requiring settlement by this Court, and does not assert any significant departure from the accepted and usual course of judicial proceedings to be manifest in that decision. In short, petitioner offers no persuasive assertion of any of the reasons for granting certiorari as enumerated by Rule 19(b) of the Revised Rules of this Court.

[1]The caption of the Petition, indicating as it does that only petitioner and this respondent are parties to the proceeding sought to be brought before this Court, is apt to be misleading. While it is quite true that petitioner is the only party seeking to invoke review by this Court herein, there are in essence three hundred nine other respondents, in addition to this respondent; consisting of all of the non-dissenting class and subclass members united in opposition to the Petition herein. A separate Brief in Opposition to the Petition is being filed by lead counsel for the class and subclass; demonstrating eloquently the fallacy of petitioner's implication that the subject settlement is one cleverly foisted by defendant upon an unwilling and unaware class and subclass membership.

Support for the settlement by the entire class and subclass membership, save only for petitioner, is not limited, however, to mere passive acquiescence in the advocacy of class counsel. Before the District Court and again before the Court of Appeals, vigorous support for the settlement was voiced, not only by lead counsel but by all associated counsel for the class, by each of five separate, independent counsel individually representing more than sixty franchisee class members; and by twenty-three class members who travelled from all sections of the United States to appear at the hearing before the District Court to express their approval of the settlement, with four of their number testifying in support thereof.

We recognize, of course, that the discretion of this Court in acting upon a petition for certiorari is not always or inexorably confined by its rules. For any relaxation of those rules, however, there surely must be some urgent and pressing *public* importance. [*N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502; *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387.] Certainly a case for relaxation of those rules is not made out by what amounts to no more than a request that this Court grant certiorari "merely to give the defeated party in the Circuit Court of Appeals another hearing." [*Magnum Import Co. v. Coty,* 262 U.S. 159, 163.] Much less is such a case made out when the only question of which review is sought is whether the District Court abused a very wide discretion admittedly conferred upon it, and whether the Court of Appeals correctly decided that it did not.

Statement of the Case.

The purported Statement of the Case presented by petitioner is sketchy, incomplete and, more important, highly inaccurate. While, for the sale of completeness and the correction of error, there is needed a more pointed and extended summary of the pleadings and facts of this case than petitioner has presented, the

specific and narrow points which he raises in his Petition may be disposed of with a fairly brief statement, limited largely to the correction of the errors in the Statement of petitioner.[2]

1. Although petitioner alleges as the gravamen of the class actions below a wide-ranging assortment of alleged tying arrangements by which, as a claimed condition of obtaining an International House of Pancakes franchise, class members were allegedly required to purchase and lease no less than seven different types and categories of unwanted items, the claims asserted and pursued in the class actions were limited to the allegedly forced purchase or lease of restaurant equipment, pancake and waffle mix, and advertising and management assistance. Class counsel disclaimed any assertion of any of the other alleged tying arrangements referred to by petitioner. [R.A. 1355-1356.][3] The issue of "menu price-fixing," as to which petitioner modestly claims "almost certain victory" for the class had the actions gone to trial [Pet., p. 11], was *never* included among the issues specified for class action adjudication. [R.D. 15.]

2. While railing at the District Court and Court of Appeals for having approved an allegedly inadequate settlement of a case in which he claims the class members had a prospect of "almost certain victory," con-

[2]If a more detailed summary is felt to be desirable, such will be found in the Briefs before the Court of Appeals, at pages 10-26 of the Brief of Appellee International Industries, Inc., and at pages 7-8 of the Class and Sub-Class Appellees' Brief.

[3]Petitioner has used the code "R.A.," followed by page numbers, for record references to portions of the printed Appendix which is part of the certified record before this Court; and "R.D." where the reference is to numbered docket entries which are also a part of the certified record but which entries have not been reproduced in the printed appendix. We shall adopt and use the same reference codes.

cerning which the defendant had no "defenses," and involving claims of illegality *per se* which "cannot be disputed" [Pet., pp. 11, 16, 21], petitioner seems blithely unaware that his rosy predictions were totally unshared, either by class counsel charged with the responsibility for trying the case or by the District Court charged with the responsibility for adjudicating it. Petitioner eschews mention of the fact that lead counsel for the class (and not merely counsel for defendant) repeatedly asserted their considered opinions that the case was on all issues a difficult and hazardous one, that defendant asserted strong and viable defenses thereto, and that a trial of the case would present a very serious and substantial risk of a defense verdict on all issues. [R.D. 188, 196, 197, 198, 199, 209, 214, 215.] Petitioner similarly ignores the express recognition by the District Court that the case turned upon substantial and vigorously contested issues of fact and law, rendering the ultimate result highly uncertain. [R.A. 744-745.]

3. Petitioner neglects as well to observe that the less optimistic predictions of class counsel and the District Court were based upon very substantially greater knowledge than his of the relevant facts and evidence. Thus, the Settlement Agreement was negotiated and submitted more than two years affter the Order for class action maintenance had been made by the District Court. [R.D. 125-127.] During that two-year period, the parties had taken and completed a total of *sixty-one* oral depositions of defendant's executives and supervisory personnel, each of the class representatives, numerous individual franchisees and class members, competitive franchisors, and third party vendors and suppliers. The transcripts of these depositions exceeded an aggregate of 20,000 pages, involving more than 150

deposition days. [R.A. 280-284; R.D. 336, 337.] Plaintiffs propounded and defendant responded to a total of *ten* sets of Interrogatories, and a set of Requests for Admissions. [R.D. 52, 53, 83, 84, 104, 105, 107, 108, 109, 114, 123, 256, 263.] Defendant propounded *four* sets of Interrogatories and a set of Requests for Admissions to plaintiffs and class members. [R.D. 56, 57, 116, 117, 147, 228, 232.] Pursuant to Requests for Production of Documents, class counsel examined and reviewed more than 100,000 separate documents, and made copies of approximately 20,000, dealing with virtually all aspects of defendant's financial history and franchise operations. [R.A. 283.]

Three separate and successive adversary hearings on applications for Preliminary Injunctions were held before the District Court, dealing with issues going to the heart of the claims of liability herein. [R.D. 17, 18, 19, 25, 91, 92, 93, 94, 95, 96, 97, 98, 99.] The resolution of one of those applications adversely to the franchisees involved not only a written opinion of the District Court, but also an appeal to the Court of Appeals and an eventual denial of certiorari by this Court. [*Helfenbein v. International Industries, Inc.*, 8 Cir., 438 F.2d 1038 *cert. den.* 404 U.S. 872.] The District Court's knowledge of and familiarity with the factual and legal issues in the case were immeasurably enhanced by a series of no less than *ten* Pretrial Conferences between October 26, 1971 and October 15, 1973.

Petitioner and his counsel attended none of the referenced depositions, participated neither in preparation of nor in response to any of the Interrogatories or Requests for Admissions, reviewed and examined none of the documents, and attended none of the

hearings or Pretrial Conferences save one. Petitioner is significantly silent concerning the existence of any hard evidence known to or discovered by him to support his Olympian proclamation that victory for the class members upon trial would have been inevitable, had it not been snatched from their grasp by their apparently too-timid counsel.

4. Petitioner refers laconically to the fact that a first proposed settlement was presented to and rejected by the District Court in July 1973 [R.A. 434]; and that the second Settlement Agreement, ultimately approved, was presented in November 1973. [Pet., pp. 6-7.] In his Statement of the Case, petitioner makes little mention of the improvements of the settlement, for the benefit of class members, between the first and second agreements. Elsewhere in his Petition, he is less reticent —and materially and regrettably less accurate. He flatly asserts that the first settlement was "a prior, almost identical, proposed settlement," and that such first settlement "contains almost the same provisions" as the second settlement which the District Court approved.[4] There

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[4]Petitioner was even less restrained in his characterization of the settlement agreements before the Court of Appeals. He there described the second settlement as being merely "a warmed-over version of the first settlement agreement" allegedly differing therefrom only in the respect that the second settlement contained an undertaking by defendant to pay the fees of all attorneys for class members as should be awarded by the District Court, to a maximum of $1,250,000.00. [Appellant's Brief, p. 7.] In the same suggestive vein before this Court, petitioner argues that, because such counsel were recommending approval of a settlement wherein they would obtain payment of such fees, "it is doubtful that class members would have been given information about the agreement with any degree of objectivity," had they made any inquiries of class counsel thereon. [Pet., p. 10.] Having so unsubtly accused all parties hereto but himself of being participants in a scheme to bribe class counsel by paying their fees, petitioner in all fairness to this Court should have advised it that

(This footnote is continued on next page)

being so little difference, in petitioner's view, between the first and second settlements, he professes to be mystified at the District Court's approval of the second settlement after it had rejected the first. [Pet., p. 14.]

Petitioner should know better. As is manifest from even the most cursory comparison of the two settlements, the second settlement presented a vastly improved package of benefits to the class members. [R.A. 619-621, 1245-1311.] The decision of the Court of Appeals herein, rejecting petitioner's assertion that there was no material difference in the two settlements, pointed out the highly significant differences between them,[5] fully justifying the District Court in approving the second settlement consistently with its rejection of the first. [*Grunin v. International House of Pancakes, supra,* 513 F.2d at 119-120, 125.]

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his *sole* objection to the attorneys' fees provision before the Court of Appeals consisted of his bitter complaint that the District Court had improperly refused to award to his counsel the latter's requested $75,000 share of the loot! [Appellant's Brief, pp. 56-59.] Petitioner appears still to be smarting over the failure to include his counsel in the distribution of the proceeds of such "bribery". [Pet., p. 7.]

[5]As pointed out by the Court of Appeals, by far the most significant difference between the two settlement agreements, but by no means the only difference between them, was in the area of reduction of future payments to be made to defendant by currently operating franchisees. The first settlement provided for a net reduction of service charge payments to be made by franchisees, after payment of attorneys' fees, of approximately *$2,500,000;* but it did not in any way affect the equipment rental payments which were the major source of objection by class members. The second settlement by contrast, provided for either reduction or termination of equipment rentals, at the option of the franchisee, upon terms which assured the franchisees of reduction and/or termination of rental payments averaging $130,000 per franchisee; or total net benefits to the class of nearly *$20,000,000* in reduced or terminated payments. To characterize, as petitioner does, the difference between $2,500,000 and $20,000,000 as being insignificant or meaningless, is to take undue license with either the English language or the laws of mathematics, or both.

5. Much of petitioner's version of the relevant facts and evidence before the District Court is not set forth in his relatively brief Statement of the Case, but is scattered throughout the portion of his Petition dealing with his argument as to the reasons he perceives for granting certiorari herein. [Pet., pp. 8-28.] The factual inaccuracies and lack of requisite completeness exhibited by his recitals in these respects will be hereinafter noted as we reply specifically to the pertinent portions of the Petition.

ARGUMENT.

I.

The Court of Appeals Correctly Ruled, Conformably to Applicable Federal Law, That the District Court's Approval of the Timing and Content of the Settlement Notice Was Well Within Its Discretionary Authority Under Rule 23.

Petitioner initially attacks the timing, manner of delivery, and form and content of the notice of settlement and of hearing thereon, as approved by the District Court for delivery to members of the class and subclass. He claims that the time allowed between notice and hearing was too short; that delivery by mail to the last known address of each member was defective and that nationwide *publication* of notice, to a class of only three hundred ten members, was also required; and that the content of the notice was insufficiently informative, because it merely summarized the salient features of, and did not set forth *in haec verba*, a 119-page Settlement Agreement. [Pet., pp. 8-13.]

Petitioner neglects to inform this Court that none of these objections to form or content of notice was presented by him to the District Court; at a stage at which, if any of his now-hypothesized defects were found to exist, they could readily have been corrected. He does not mention that his opposition before the District Court was restricted to his objections to the fairness of the settlement itself. And he does not expressly admit here, as his counsel candidly admitted in oral argument before the Court of Appeals, that the alleged defects in the notice did not occur to him until *after* his appeal had been taken; and that he *first* concluded that the notice was defective when he reviewed it in

connection with the preparation of his Opening Brief before the Court of Appeals. The latter Court duly and appropriately noted the lateness of petitioner's first assertion of these contentions. [513 F.2d at 122-123.]

Be that as it may, each of petitioner's contentions in this regard *was* made before the Court of Appeals; and each contention was considered, carefully analyzed and correctly rejected by that Court. [513 F.2d at 120-122.] Petitioner merely repeats his arguments in less discursive form before this Court; but he offers no indication wherein he perceives error of constitutional magnitude in the disposition of those arguments below.

To start with, the subject notice *was* approved by the District Court as to both timing and form, and *was* ordered by it to be delivered by mail to each class member's last-known address. These are all matters that are well within the discretion of the District Court. Rule 23(e) of the Federal Rules of Civil Procedure provides simply that such notice shall be given "in such manner as the court directs." Professor Wright has stated that this provision "leaves the court with virtually complete discretion" as to the form, timing and delivery of such notice. [7A Wright and Miller, *Federal Practice and Procedure*, § 1797, p. 237.] The determination by the District Court relative to these matters may be overturned on appeal only if that determination is so manifestly unreasonable as to constitute a clear abuse of discretion. [*Air Line Stewards v. American Airlines*, 7 Cir., 455 F.2d 101, 108; *State of West Virginia v. Chas. Pfizer & Co.*, 2 Cir., 440 F.2d 1079, 1090 *cert. den.* 404 U.S. 871.]

The Court of Appeals properly concluded that no such abuse of discretion was here shown. Concerning

the form and content of the notice, it pointed out that the notice appropriately and accurately summarized the important aspects of the settlement, that there is no requirement that the entire settlement agreement be recited *in haec verba* or attached as an exhibit to each copy of the notice, and that in fact to do so here would probably not have enhanced the understanding by class members of the settlement but would instead have introduced confusion and a great potential for misunderstanding. In so ruling, the Court of Appeals did not depart from, but instead followed and correctly applied established legal principles. [*State of West Virginia v. Chas. Pfizer & Co., supra; United Founders Life Ins. Co. v. Consumers Natl. Life Ins. Co.*, 7 Cir., 447 F.2d 647, 654; *Philadelphia Housing Authority v. American R. & S. San. Corp.*, E.D. Pa., 323 F.Supp. 364, 378; see also, *Manual for Complex Litigation* (1975), § 1.45.] That petitioner would retrospectively have worded the notice differently, or that he would have given class members more information or less information, does not entitle him to involve this Court in his proposed exercise in semantic nit-picking.

The Court of Appeals also quite properly rejected petitioner's claim of inadequacy of the twenty-day notice of hearing provided to class members.[6] Neither Rule

[6]Petitioner blandly asserts that the notice period was *nine*, and not *twenty*, days; apparently conceding the sufficiency of the longer period. [Pet., p. 9.] The tortuous and tortured process of reasoning by which he makes his computation is instructive. First, he chops off *five* days by treating the terminus of the notice period as being the date specified for filing of written appearances and not the later date of hearing; even though objections were not required to be made and would not be heard until the later date, and even though petitioner and his counsel appeared at the hearing, objected and were heard in full despite their failure to file their appearance by the specified date or at all. Then he excises *four* more days because of the two intervening weekends, apparently presuming that no attorney could be found who was willing to work on Saturday or Sunday on a matter of such importance; and he also deducts *two* more days for the intervening Thanksgiving period, again demonstrating his apparent conviction that all competent attorneys are charter members of the super-leisure class. Petitioner offers no indication as to why this case justifies the peculiar expedient, contrary to the notice provisions of all statutes of which we are aware, of computing required notice time on the basis only of *working* days in the narrowest meaning of that term.

23 nor the due process clause specifies any fixed or minimum notice period. The notices approved by all Courts in the incredibly more complex and far-reaching antibiotic drug cases provided a maximum of twenty-eight days between notice and hearing. [*State of West Virginia v. Chas. Pfizer & Co., supra.*] A notice period of as little as ten days has been held sufficient in the circumstances of a particular class action where, *as here*, the class membership was relatively small, highly cohesive, knowledgeable and actively involved in and concerned with the progress of the litigation. [*Air Line Stewards v. American Airlines, supra;* see also, 7A Wright and Miller, *Federal Practice and Procedure*, § 1786, pp. 149, 154.]

In determining the period of notice which will be sufficient in any given case, the District Court is required merely to afford "a reasonable time for those interested to make their appearance with due regard to the practicalities and peculiarities of the case, thus satisfying the demands of due process." [*Air Line Stewards v. American Airlines, supra; Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-314.] In the case at bar, the District Court and the Court of Appeals properly considered the following "practicalities and peculiarities" of this case as bearing upon the length of the notice period necessary to satisfy the requirements of due process: (1) the small size and cohesiveness

of the class and the awareness of the progress of both the litigation and the settlement negotiations by the class members; (2) the conduct of the hearing upon and disapproval of the first proposed settlement, in which hearing most of the class members participated and at which they were represented by several sets of independent counsel who continued thereafter to represent and advise them in connection with the continuing negotiations; (3) the continued monitoring of the litigation and negotiations by class members, individually, through their own counsel, and through the IHOP Franchise Association to which virtually all of them belong; (4) the fact that, before the settlement agreement was executed, the terms thereof were submitted to and approved by all participating, independent counsel, a large number of class members, and the officers and directors of the IHOP Franchise Association (*including petitioner*); and (5) the fact that *not one* class member protested or objected to the notice period, either at or prior to the hearing, and that no one ever requested an adjournment or continuance of the hearing to allow time for preparation or presentation of objections, or indicated in *any* manner that he felt himself disadvantaged by the length of the notice period. [R.A. 587-592, 1340-1347, 1376-1377.] The Court of Appeals properly held that, in these circumstances, the notice period was not impermissibly short. [513 F.2d at 121.]

Petitioner's only response to this demonstration is to *deny* that he had been kept informed of the settlement negotiations. [Pet., p. 10.] The sworn testimony below

is squarely to the contrary. [R.A. 1340-1347.] To make this startling denial, as well, petitioner would apparently disavow *his own signature,* appearing upon a communication dated October 31, 1973 from the officers and directors of the IHOP Franchise Association to class counsel, *expressly approving* the basic terms of the settlement then proposed and thereafter concluded. [R.A. 1376-1377.] Indeed, the position of petitioner below, in contrast to the posture now taken by him before this Court, was not that he was unaware of the settlement negotiations, and not that he had not approved the terms of settlement ultimately secured; but was rather that, having so approved those terms, he subsequently changed his mind! [R.A. 1348.]

The Court of Appeals, having carefully considered each of the arguments voiced by petitioner, concluded that, in the totality of the circumstances here, the content of the settlement notice fairly and adequately apprised class members of the nature of the proposed settlement, the notice period provided was ample for the formulation and presentation of objections, and the manner of delivery was the best notice practicable in the circumstances.[7] Its ruling to that effect in the case at bar has not been shown to present any cause for further review by this Court.

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[7]With this latter point, this Court is apparently squarely in agreement. [*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 174-177; *New York v. N.Y., N.H. & H.R. Co.,* 344 U.S. 293, 296.]

II.

The Court of Appeals Correctly Concluded That the District Court Did Not Abuse Its Discretion in Approving Settlement in a Case in Which Liability Was Strongly Disputed and Closely Contested, and as to Which the Result Was Highly Uncertain. Settlement Approval in Such Circumstances Neither Condones the Continuance of Any Illegal Practices nor Does It Subject Class Members to Unwilling Compliance Therewith.

Petitioner diffuses across three separately stated argument headings [Pet., pp. 13-24] the single argument that the District Court and the Court of Appeals erroneously approved a settlement that, in his view, perpetuates and subjects class members to continuing compliance with practices and requirements that, also in his view, were "almost certain" to be declared illegal had there been a trial on the merits.

Petitioner espouses this supremely confident view of the ultimate outcome of the litigation in impressive solitude. Not only is his view remarkably unshared by the District Court [R.A. 742-745] or the Court of Appeals [513 F.2d at 124]; but it is contrary to the considered opinion of class counsel who had conducted all pretrial discovery and trial preparation herein [R.A. 1037-1041; R.D. 196, 197, 199], and of counsel for defendant as well. [R.A. 284-290.][8]

The central determination to be made in assessing the fairness of a proposed class action settlement is that

[8]Petitioner, of course, in arriving at his prophecy of the ultimate result herein is totally unburdened and unhindered by any detailed knowledge of the oral testimony, documentary evidence and legal theories and arguments developed and explored by counsel for the litigants during the five-plus years that this litigation was conducted prior to settlement.

derived from a comparison of the rewards and benefits to be derived therefrom by the class members, as against the relative likelihood of victory or defeat for the class members in the event of trial. [*Protective Committee v. Anderson,* 390 U.S. 414, 424; *State of West Virginia v. Chas. Pfizer & Co.,* 2 Cir., 440 F.2d 1079, 1085 *cert. den.* 404 U.S. 871; *Newman v. Stein,* 2 Cir., 464 F.2d 689, 690-692.] Since it is a purpose of any settlement to avoid the necessity of a binding adjudication on the merits either favorably or adversely to any of the settling parties, the trial or appellate court cannot and does not make any determination as to the merits of any disputed claim or defense. The province of the court in passing upon such proposed settlement is limited to a determination whether the respective claims and defenses are substantial and viable, so that the outcome of the litigation is hazardous and uncertain, and the settlement therefore justifiable as a preferable alternative to the uncertainties and vicissitudes of such litigation. [*Young v. Katz,* 5 Cir., 447 F. 2d 431, 432-434 *and cases cited therein; United Founders Life Ins. Co. v. Consumers Natl. Life Ins. Co.,* 7 Cir., 447 F.2d 647, 656.]

It was precisely such an evaluation of the strength and viability of respondent's defenses on the merits herein, which petitioner declines to make, which the District Court and Court of Appeals were required to and did make; and which led those Courts to conclude that the settlement was properly approved because of the distinct possibility or probability that respondent would ultimately prevail upon those defenses.

The principal, but by no means the only, defenses asserted and maintained by respondent herein, all of which appear to have been clearly understood and evaluated

by the District Court and the Court of Appeals, but which petitioner persistently misunderstands, misstates and misrepresents, are hereinafter set forth in summary fashion.

First. With respect to the alleged tie of equipment lease to acquisition of franchise and trademark license, the evidence adduced through pretrial discovery established that the equipment lease was merely *offered* by respondent as part of a "turnkey" operation tendered to franchisees, that lease of equipment was never made a condition or requirement of acquisition of the trademark license, and that the license could be obtained from defendant and the requisite equipment procured elsewhere. The evidence further showed that few, if any, franchisees ever had or expressed any desire or intention to acquire their equipment from a source other than respondent, that *no* franchisee was ever told that he could not do so, and that those franchisees expressing a wish to obtain their equipment elsewhere were told that they were free to do so without effect upon their acquisition of the allegedly "tying" trademark license. [R.A. 286-288, 742-745, 1072-1073.]

An illegal tying arrangement is not made out by evidence merely that a seller or lessor *offered or even preferred* to sell the allegedly tied and tying products jointly. A tying arrangement is made out only if the seller refuses to sell the allegedly tying product unless the allegedly tied product is also purchased from him. [*United States v. Paramount Pictures,* 334 U.S. 131, 159; *Amer. Mfrs. Ins. Co. v. Amer. Bdcstg-Paramount Theatres,* 2 Cir., 446 F.2d 1131, 1137 *cert. den.* 404 U.S. 1063; *Advance Bus. Sys. & Sup. Co. v. SCM Corp.*, 4 Cir., 415 F.2d 55, 69 *cert. den.* 397 U.S. 920; see also, *United States v. Loew's Inc.*,

371 U.S. 38, 49-50, 55.] If a purchaser, having the freedom to procure one product from the seller without thereby being required to purchase another product from the same seller, chooses instead to purchase both products from the seller, an illegal tying arrangement does not result since joint purchase was not a requirement or compelled condition of the transaction. [*United States v. Paramount Pictures, supra; United States v. Loew's, Inc., supra; Landon v. Twentieth Century-Fox Film Corp.*, S.D.N.Y., 1974-2 Trade Cases ¶ 75,-363; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, S.D. Fla., 1974-2 Trade Cases ¶ 74,422; *Cokeley v. Tandy Corp.*, N.D.Cal., 1974-2 Trade Cases ¶ 75,426.][9]

Contrary to petitioner's legally unsupported view [Pet., p. 21], the *existence* in the seller of economic power over the tying product sufficient, if used, to compel purchase of the tied product, will not establish a tying arrangement in the absence of further evidence that such power has been *used* by the seller in order to *compel* the purchase of the tied product by making it otherwise impossible for the buyer to obtain the tying product alone.[10] "Foreclosure implies *actual*

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[9]A much more detailed and comprehensive review of these legal principles will be found in the Briefs before the Court of Appeals; particularly at pages 37-45 of the Brief of Appellee International Industries, Inc.

[10]This requirement has occasionally been stated, perhaps oversimplistically, as a requirement of *coercion* in the purchase of the "tied" product. The use of the term has led to some confusion in the application of the doctrine, exemplified by the recent decision in *Ungar v. Dunkin' Donuts of America, Inc.*, E.D.Pa., 1975 Trade Cases ¶ 60,204. Regardless of whether or not a charge of illegal tying arrangement requires proof of "coercion" in the sense of the use of force, threats or duress, it is quite clear that illegality *does* require proof that the seller refused to

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exertion of economic muscle, not a mere statement of bargaining terms . . ." [*Amer. Mfrs. Ins. Co. v. Amer. Bdcstg-Paramount Theatres, supra,* 446 F.2d at 1137. Emphasis supplied.]

It was and is respondent's contention, supported by substantial evidence in the record below and virtually uncontradicted upon that record, that its franchisees were not required or compelled to lease equipment from it as a condition of obtaining the trademark license. Reviewing that evidence and recognizing the applicability of the legal principles above discussed, the Court of Appeals here concluded that "the alleged illegality . . . is not a legal certainty." [513 F.2d at 124.] If anything, that is a major understatement of the case for the defense.

Furthermore, as the Court of Appeals expressly recognized [513 F.2d at 124], respondent had an absolute defense on this issue as to fully half the class members, who acquired their franchises from respondent with respect to already existing and operating restaurants in which the equipment had long previously been installed and affixed as an inseparable part of the franchised restaurant. [R.A. 287.] In such cases, the equipment in place was integral to the franchised restaurant, thus making impossible the satisfaction of the "two product" requirement; so that even the hypothetically required lease of the equipment would not, in such cases, constitute an illegal tying arrangement. [*Beefy Trail, Inc. v. Beefy King International,* M.D. Fla., 348 F.Supp. 799, 806-807.]

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sell the tying product unless the tied product was also purchased from him, and that the buyer was compelled to buy the tied product from the seller because he could not otherwise obtain the tying product.

Petitioner, however, claims that the Court of Appeals erred in considering the voluntary character of the equipment leases as being a viable defense to the charge of illegal tying arrangement. Relying entirely upon a single, recent District Court decision [*Ungar v. Dunkin' Donuts of America, Inc.,* E.D. Pa., 1975 Trade Cases ¶ 60,204], he misreads that decision as holding that a tying arrangement may be established even though proof is lacking that the purchase of the "tied" product was required or compelled as a condition of purchase of the "tying" product. Recognizing that the overwhelming weight of authority is quite squarely contrary to his interpretation of the *Ungar* decision, he urges that this Court grant certiorari to resolve a "conflict," not between the decision of the Court of Appeals here and that of any other Court of Appeals, but between the decision of a District Court in another case and the decisions of the Court of Appeals here and of every other Court that has heretofore ruled upon the issue. He asserts that this Court has not yet addressed itself to this issue, and he urges that it do so through the medium of review of this case. [Pet., pp. 18-21.]

Petitioner is wrong on all counts.

Initially, it does not seem unreasonable to expect that petitioner would have informed this Court that the *Ungar* decision was certified for interlocutory appeal under Section 1292(b) of the Judicial Code by the District Court by which that decision was rendered, and that the Court of Appeals for the Third Circuit has accepted the appeal. [*Ungar v. Dunkin' Donuts of America,* E.D. Pa., 1975 Trade Cases ¶ 60,361.] The certification was granted on the express basis of the disputed issue of "the propriety of our rejection of the individual coercion doctrine and the correctness of our re-

sultant conclusions . . . as to the requisite proof to establish conduct constituting an illegal tie." [¶ 66,537.] Thus it appears that the doctrine of the *Ungar* case, as petitioner views it, is to be authoritatively reviewed in the circuit in which it was pronounced; and that the precipitate intervention of this Court in another case is not here required in order to obtain that review.

Moreover, and perhaps more important, the *Ungar* case does not establish a rule, such as that for which petitioner cites it, that a tying arrangement may be established even in the absence of proof that the purchase of the tied product was required or compelled as a condition of obtaining the tying product. The District Court in *Ungar* specifically recognized the necessity of proof of such requirement or compulsion but it held that, in a context of a class action, proof of "*individual* coercion" as to *each* class member would not be required; *i.e.*, that it would not be a defense that *some* purchasers would voluntarily have purchased the tied product from the seller even if the latter had not refused to sell the tying product without also selling the tied product. Even under the *Ungar* "rule," proof would still be required that the purchase of the tied product was, by the seller, made a necessary condition of obtaining the tying product from that seller; and it was the absence of evidence of such a condition, required in *Ungar* as in all other cases, that was held by the Court of Appeals in the case at bar to make the success of the class members on the equipment lease issue far from "a legal certainty."

Petitioner also errs in his claim that this Court has not heretofore settled "this important question of federal law." [Pet., p. 21.] In *United States v. Paramount*

Pictures, 334 U.S. 131, 159, this Court ruled that block-booking of motion pictures would constitute an illegal tying arrangement *only* if the distributor refused to license the exhibition of a desired motion picture unless the exhibitor also agreed to exhibit and pay for other undesired motion pictures. In *United States v. Loew's Inc.,* 371 U.S. 38, it was held that illegal tying was achieved only by "successful pressure . . . to accept inferior films along with desirable pictures" [371 U.S. at 40], wherein exhibitors were "forced . . . to take unwanted films" because they could not otherwise obtain the desired films [371 U.S. at 49]; and the previous ruling of this Court in *Paramount Pictures,* above summarized, was expressly reaffirmed [371 U.S. at 55]. In these circumstances, the question hardly seems to require further "settlement".

Second. As applied to the claim of an illegal tie between the sale of the franchise and the required procurement of essential franchisor services, including advertising, the evidence abundantly established that franchisor services were not merely essential to, but an integral part of, the franchised operation, and of necessity could only be supplied by the franchisor. [R.A. 279-290, 1002-1003; R.D. 92, 93.]

In these circumstances, the Court of Appeals properly held that the class members' likelihood of success upon their claim of illegal tie here was most highly dubious because of their inability to meet the requisite "two product" test. [513 F.2d at 124.] In so ruling, the Court of Appeals simply followed its own factually indistinguishable and clearly controlling decision in *Kugler v. AAMCO Automatic Transmissions,* 8 Cir., 460 F.2d 1214, 1215, *aff'g.,* D. Minn., 337 F.Supp. 872, 874-876, wherein it was expressly held that franchisor serv-

ices were not "tied" to the franchise, but were "rather inexorably bound as a part of the license itself." The *Kugler* decision was, in turn, squarely in accord with the rule established by this Court and by other Courts of Appeal in analogous situations. [*Times-Picayune Pub. Co. v. United States,* 345 U.S. 594; *International Mfg. Co. v. Landon, Inc.,* 9 Cir., 336 F.2d 723, 730 *cert. den.,* 379 U.S. 988; *Dehydrating Process Co. v. A. O. Smith Corp.,* 1 Cir., 292 F.2d 653, 655 *cert. den.* 368 U.S. 931.]

Third. As pointed out by the Court of Appeals, a similar probable inability of the class members to meet the "two product" requirement rendered their probability of success highly dubious and uncertain in respect of their claim of an illegal tie between the license to operate an International House of *Pancakes* restaurant and the required purchase of *pancake* mixes for use in the preparation and service to the public of the advertised pancakes upon which the entire operation was founded.[11] And further, as to this specific alleged tie, an additional and quite probably insurmountable barrier to the success of the class members was interposed by the overwhelming evidence that maintenance of uni-

[11]The evidence here established that pancakes and waffles made from the subject mixes were unique and highly distinctive, of uniformly better quality and taste than any others, readily recognized by the public as being available only from International House of Pancakes, and not subject to duplication by use of any other mix. So distinguishable here is the situation presented by *Siegel v. Chicken Delight,* 9 Cir., 448 F.2d 43, wherein there were *no* unique or distinctive chickens, wherein *any* edible chickens were acceptable, and wherein the franchisor made no effort to standardize or to obtain uniform quality of the chickens prepared and sold at franchised outlets.

formity and quality control in respect to these specific products could not be achieved by specification of standards or by any other measures less restrictive than the requirement of purchase from respondent. [*Susser v. Carvel Corp.,* 2 Cir., 332 F.2d 505, 520; *In re Chock Full O'Nuts Corp., Inc.,* F.T.C. Docket No. 8884, 1973 Trade Reg. Rep. ¶ 20,441; see also, McCarthy, *Trademark Franchising and Antitrust: The Trouble With Tie-Ins,* 58 Cal.L.Rev. 1085, 1092 (1970).]

From the foregoing analysis, it becomes quite clear, as it was clear both to the District Court and the Court of Appeals, not only that the lease of equipment and purchases of pancake mix and franchisor services had not been shown or adjudicated to be illegal tying arrangements, but that it was at best highly uncertain and at worst quite improbable that they could be proved to be illegal at a trial on the merits. Since such leases and purchases were neither shown nor adjudged to be illegal, the Court of Appeals quite properly held that their continuance through the medium of a judicially-approved settlement did not constitute the continuance or "perpetuation" of any violations of the antitrust laws. [513 F.2d at 123-124.] Contrary to petitioner's *ipse dixit* [Pet., p. 16], and as the foregoing analysis demonstrates, there is nothing "illogical" in such a conclusion.

In essence, petitioner here contends that, once a claim is made in a class action context that certain practices and conduct violate the antitrust laws, and such claim has not been finally adjudicated, realistically

no settlement can be made of that action short of final adjudication on the merits. A defendant, faced with such a claim and convinced of the strength of its defense that such conduct does not violate the antitrust laws, will most certainly not buy settlement at the price of unconditional surrender by entirely ceasing conduct that it vigorously claims to be lawful. Logic dictates that settlement in such cases can be realistically achieved only by modification of the challenged conduct in manners and respects acceptable to all parties, and agreement to the continuance of such conduct in such modified form—just as was done in the case at bar. In petitioner's view, however, such a settlement cannot be countenanced because it would "continue" in modified form the conduct and practices claimed but not adjudicated to be wrongful. Petitioner would convert every class action under the antitrust laws into Armageddon.

No such result is required, either by Rule 23 or by the antitrust laws. To the contrary, it is quite clear that negotiated settlements will be approved and enforced, even though the terms of the settlement contemplate the continuance in modified form of conduct and practices alleged, but not adjudicated, to be in violation of federal law, including the antitrust laws. [*Cities Service Oil Company v. Coleman Oil Company*, 1 Cir., 470 F.2d 925 *cert. den.* 411 U.S. 967; *Air Line Stewards v. American Airlines*, 7 Cir., 455 F.2d 101, 109; *Millstein v. Werner*, S.D.N.Y., 57 F.R.D. 515, 523.]

III.

An Agreement for the Settlement of a Class Action, Which Provides No Fund From Which Legal Fees of Counsel for the Class May Be Paid, Is Not Subject to Disapproval Merely Because It Provides for Payment of Such Fees by Defendant, Where the Actual Fees to Be Awarded Are Determined by the Court and Where the Agreement Merely Provides a Specified and Disclosed Ceiling on Defendant's Obligation.

There is a curiously unreal quality to petitioner's contention, first raised in his Petition here and presented neither to the District Court nor to the Court of Appeals, that "the conscience is shocked" by the provision in the Settlement Agreement for respondent's payment of such fees as are awarded by the District Court to counsel for the class, subject to a specified and disclosed upper limit. Petitioner professes to find himself so "shocked" by such provision as to urge reversal of the Judgment approving the settlement, on that ground alone. [Pet., pp. 25-28.]

Petitioner evidently does not "shock" either easily or quickly. In this instance, his "shock" did not occur until the point of presentation of the subject Petition, since this point was never raised or even hinted at before the District Court or the Court of Appeals. It is illuminative, however, to observe what petitioner *did* have to say in the lower courts upon the subject of the agreement for payment of attorneys' fees.

Before the District Court, while petitioner asserted various claimed grounds for urging disapproval of the

settlement, the attorneys' fee provision was not one of them. To the contrary, *petitioner's counsel* presented a written application that *he be awarded a share of those fees*; modestly assessing the value of his services to the class at the sum of $75,000. [R.A. 706-707.] He further testified in favor of h application, at the hearing before the District Court on the fees to be awarded; stating that "I do think that the fees that have been asked are fair and reasonable under the circumstances," and indicating not the slightest doubt as to the propriety of the fee agreement. [R.A. 1242-1244.] Evidently, the "conscience" of petitioner and of his counsel had at that point not yet begun to be "shocked".

The District Court thereafter made its award of fees, in the amounts and to the respective counsel deemed by it to be entitled thereto. [R.A. 1316-1327.] Petitioner was not yet "shocked" by defendant's agreement to pay the fees awarded by the District Court to counsel for the class. His "shock" was confined to the fact that the District Court had declined to allow his counsel to share in the receipt of such fees. Before the Court of Appeals, he argued only that the District Court had erred in denying fees to his counsel, and that the fee award should be reversed so as to obtain for his counsel a share of that award; but he still did not question the propriety of the fee agreement. [Appellant's Brief, pp. 55-59; Appellant's Reply, pp. 14-15.]

The Court of Appeals concluded that the "decision to deny Fichtner's application for fees . . . will not be disturbed." At that point, petitioner became truly "shocked". His counsel having by the District Court and the Court of Appeals been denied his requested share in the fees which defendant had agreed to pay, petitioner suddenly discovered that the entire fee agree-

ment was so "shocking", not only to his own conscience but also to "legal ethics and public policy," as to fatally infect the entire settlement!

Petitioner's moral indignation, even if it had not been so tardily aroused, is wholly unwarranted upon the facts of the case at bar. While the Settlement Agreement provided for direct and measurable monetary benefits to class members which the District Court found to have a value in excess of $12,500,000 [R.A. 1316], it created no monetary fund from which counsel for the class could be compensated for their services in procuring the settlement. No money was to be paid to class members, defendant's "payment" consisting of the forgiveness or reduction of equipment rental payments thereafter scheduled to be made to it by class members. The *only* way in which counsel for the class could be compensated at all would be through payment of their fees by defendant.

The Settlement Agreement therefore contained a provision by which defendant undertook to pay fees, in such amount as the District Court should ultimately award as fair and reasonable, to such attorneys as it should make such award. To set an upper limit on the extent of the obligation undertaken by it, defendant insisted upon and obtained a provision by which its fee obligation would not exceed $1,250,000.[12] [R.A. 444.] The fealty of class counsel to the members of the class could no more have been compromised by this specific and entirely disclosed agreement than it would

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[12]Such a provision could hardly have been a "bribe" or a benefit to class counsel, as petitioner now implies; since the District Court stated that it would, absent the limitation upon which defendant insisted, have found aggregate fees of $2,500,000 to have been fair and reasonable. [R.A. 1320.]

be in any other class action wherein the payment of counsel fees would and could be made only from the proceeds of an approved settlement.

The portion of the *Manual for Complex Litigation,* cited and partially quoted by petitioner [Pet., p. 27], when read in its entirety and with the inclusion of the parts selectively omitted by petitioner from the quotation, does not support the proposition for which it is cited. So read, it becomes quite clear that the objection of the editors of the Manual is not to the agreement in a class action settlement for the payment by defendant of attorneys' fees awarded by the court to class counsel; but it is rather to such agreement wherein the amount and terms of such payment are not disclosed to the court or to members of the class, and to the utilization of such a private agreement as a means of circumventing the supervisory authority of the District Court to determine the amount of such fee awards and the counsel entitled thereto.

The crux of the objection stated in the Manual to such private fee agreements lies in the sentence thereof which petitioner very carefully *did not quote:* "Only if the aggregate of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment as to the fairness and reasonableness of a proposed settlement." [*Manual for Complex Litigation,* § 1.46, p. 58.]

The fee agreement here considered contained none of the evils condemned by the editors of the Manual. The amount of defendant's fee undertaking and the terms thereof were described in detail in the Settlement Agreement and were fully disclosed to the District Court and to the members of the class and subclass; there was no concealment or attempt to conceal. Rather than attempting to evade judicial control of the fee award, the parties all submitted their fee applications to the District Court; and it was the court, and not the parties, which determined the amount of the fees and the counsel to whom fees should be awarded, limited only by the ceiling established upon the obligation of defendant thereon.

Conclusion.

The Petitioner herein presents no questions that are novel and important, none that have not heretofore been settled and resolved in a manner entirely consistent with that in which they were resolved by the Court of Appeals herein, and none that suggest the necessity or desirability of re-examination by this Court. It is time to close the books upon this extended litigation. The Petition for Certiorari should be denied.

Respectfully submitted,

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